Supreme Court, U.S.
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No. 97-1101

In The

Supreme Court of the United States

October Term, 1997

MILTON BARNES,

Petitioner,

vs.

MARTIN LOGAN, KOREN LOGAN, Trustees for the Logan Inter Vivos Trust,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

DOES THE SAME STANDARD OF REVIEW OF ARBITRAL CLAIMS APPLY WHEN THE ARBITRATION PANEL HAS AWARDED PUNITIVE DAMAGES THAT WOULD OTHERWISE APPLY?

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PRAYER

Respondents, Martin and Koren Logan, respectfully request that the Court deny the Petition for Writ of Certiorari, seeking review of the decision of the United States Court of Appeals, Ninth Circuit entitled *Barnes v. Logan*, 122 F.3d 820 (9th Cir. 1997).

STATEMENT

The factual background of the matter presented by the Petition for a Writ of Certiorari of petitioner, Milton Barnes, largely comes from the parties' briefs and the opinions of the lower courts as no reporter's transcript reporting the underlying arbitration proceedings was made part of the record below. Therefore, the background and description of the arbitration proceedings are summarized in the decisions of the lower courts.

An arbitration panel of the National Association of Securities Dealers, Inc. ("NASD") heard evidence regarding the Logans' claims against petitioner Barnes and others that their account had been mismanaged and had declined in value from $464,000 to $269,000 in nine months, during which period petitioner Barnes had earned $123,000 in commissions. The arbitration panel heard evidence regarding the Logans' investment objectives, how petitioner Barnes managed the account, and related issues such as asserted misrepresentations by Barnes and whether Barnes had churned the account. The arbitration panel resolved these issues in the Logans'

favor and awarded them $261,561 in compensatory damages, plus $27,463 in pre-award interest, jointly and severally against petitioner Barnes, John G. Kinnard & Company, Inc., the brokerage firm with which Barnes was affiliated at the time of the transactions at issue, and another individual (Scott Grady). The panel also considered the Logans' request contained in their Statement of Claim and advocated at the hearing that punitive damages be assessed against Kinnard & Co., Grady, and Barnes. The panel then awarded the Logans $500,000 in punitive damages against Kinnard & Company and Grady, and $250,000 in punitive damages against petitioner Barnes. The district court denied Barnes' position to vacate the arbitration award and granted the Logans' motion to confirm the award.

REASONS FOR DENYING THE PETITION

I. Petitioner Failed to Raise All of His Arguments Below

The Ninth Circuit noted that Barnes had made "something akin to a due process argument" by contending that arbitral awards of punitive damages be subject to "some kind of 'heightened scrutiny.' " *Barnes v. Logan supra,* 122 F.3d at 824. Petitioner's argument in the Ninth Circuit was simply a variation on his contention that the arbitration panel had allegedly awarded punitive damages without proof of his financial condition in purported violation of California decisional law entitled *Adams v. Murakami,* 54 Cal.3d 105 (1991). Although Barnes now asserts in his petition that the award of punitive damages

against him was a "crushing financial penalty" and a "ruinous punitive damages award[ ]," he did not attack the award in the district court or on appeal on the grounds that it was excessive or disproportionate to the compensatory damage award, or beyond his means to pay, or disproportionate to his culpability.

Although petitioner did argue below for "heightened scrutiny" of the arbitration panel's award of punitive damages, he failed to articulate precisely what scrutiny to which he was contending he was entitled by either the district court in the first instance or the Ninth Circuit on appeal. Petitioner now contends in his petition that such judicial scrutiny must be "meaningful," but failed to argue below how the review he did receive was not "meaningful." The district court found that petitioner had agreed to arbitration fully aware of the nature of the proceedings involved and the "limited judicial review" afforded it. Petitioner failed to argue below how the various standards of review under which he sought to vacate the award – manifest disregard of the law and arbitral authority in excess of its powers under § 10(a) of the Federal Arbitration Act, 9 U.S.C. § 10(a)(iv) – did not afford him meaningful review.

This and the failure of petitioner to present other due process arguments undoubtedly led the Ninth Circuit to characterize petitioner's arguments as "something akin to a due process argument." For example, petitioner did not argue to the district court or in his opening brief in the Ninth Circuit how NASD arbitrations or punitive damages assessed in them constitute state action. It was only when the Logans noted in their appellees' brief in the Ninth Circuit the absence of the state action component

that petitioner made the state action argument now contained in footnote five of his Petition for a Writ of Certiorari. As the Logans pointed out in their brief to the Ninth Circuit, numerous courts have held that state action required to trigger due process analysis is absent in arbitral proceedings. (See, e.g., *FDIC v. Air Florida System*, 822 F.2d 833, 842 n.9, *cert. den.*, 485 U.S. 987, 108 S. Ct. 1289 (9th Cir. 1988); *First Heritage Corp. v. National Association of Securities Dealers, Inc.*, 785 F. Supp. 1250, 1251 (D.D. Mich. 1992).

Barnes' petition contains other new arguments not presented below. Whatever sanctions may be imposed upon him by the NASD for failing to pay the Logans' award, or for engaging in the transactions at issue in the underlying arbitration proceedings, are not germane to his petition. Barnes' argument in his petition at pp. 11-12 regarding alleged differences between California Civil Code § 3294 and Minn. Stat. § 549.20 were only made to the Ninth Circuit in an unsuccessful petition for rehearing, and were only made after the Ninth Circuit held that Minnesota substantive law applied, notwithstanding petitioner's assertions about the applicability of California law and *Adams v. Murakami, supra.*

II. No Decision of this Court Holds That Due Process Requires Meaningful Judicial Scrutiny of Arbitral Awards of Punitive Damages

The assertion in Barnes' petition that the Ninth Circuit's decision is in direct conflict with decisions of this Court must be seen as hyperbole. No decision of this

Court cited by petitioner, or otherwise, holds that procedural due process or heightened judicial scrutiny is required to review arbitral punitive damage awards. Nor is the decision of the Ninth Circuit in this case, or the other Ninth Circuit decision attacked by petitioner, *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991), alone in so holding. In fact, the Eleventh Circuit recently rejected a brokerage firm's contention identical to petitioner's that punitive damages awarded in securities arbitrations violate the Due Process Clause for lack of procedural protections and meaningful judicial review contrary to *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 114 S. Ct. 2331 (1994) and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032 (1991). *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995).

In *Davis*, the Eleventh Circuit agreed with other courts which have held that the state action element of a due process claim is absent in private arbitration cases (citing *Federal Deposit Ins. Corp. v. Air Florida Sys., Inc., supra*, 822 F.2d 833, 842 n.9). 59 F.3d at 1191. The Eleventh Circuit then assumed arguendo that state action was involved, but rejected the brokerage's contention that *Honda Motor Co.* and *Haslip* required judicial review of arbitral awards of punitive damages. The Eleventh Circuit distinguished those cases as requiring judicial review of punitive damage awards by juries, but not where the parties have agreed to submit their dispute to arbitration, and have empowered the arbitrators to consider the issue

of punitive damages. *Davis v. Prudential Securities, Inc., supra,* 59 F.3d at 1192.[1]

Honda Motor Corp. v. Oberg is inapplicable for another reason. This Court struck down in that case an amendment to the Oregon Constitution that deprived courts of the authority to review the size of a punitive damage award or to order remittitur of excessive awards. 114 S. Ct. 2331. Specifically, the Court in *Honda* held that due process requires some type of meaningful review of the size of a punitive damage award. *Id.* at 2341. But petitioner did not challenge the size of the punitive damage award against him in the lower courts, and so *Honda* is of no avail to him.

Adams v. Murakami, supra, 54 Cal.3d 105, is similarly inapplicable as an expression of due process requirements for an award of punitive damages. In that case, the Supreme Court of California stated that it neither needed to decide nor was deciding whether evidence of a defendant's financial condition is a *constitutional* prerequisite under *Haslip* to an award of punitive damages in judicial proceedings. 54 Cal.3d at 118. (Original emphasis.)

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[1] See also *Park v. First Union Brokerage Services, Inc.,* 926 F. Supp. 1085, 1089 (M.D. Fla. 1996), rejecting a due process challenge to arbitral punitive damage award of $500,000 for lack of state action and because of voluntary nature of arbitration; *Jeppson v. Piper, Jaffray & Hopwood, Inc.,* 879 F. Supp. 1130 (D. Utah 1995), also rejecting a due process challenge by noting that under *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 113 S. Ct. 2711, 2720 (1993), a judgment that is the product of a process in which fair procedures were followed is entitled to a "strong presumption of validity."

The decisions of the lower courts in this case that arbitral awards of punitive damages are subject to limited judicial review was based upon the Ninth Circuit's decision in *Todd Shipyards Corp. v. Cunard Line, Ltd. supra,* 943 F.2d 1056, as well as the district court's factual finding that petitioner entered into the subject arbitration agreement fully aware of the nature of the proceedings involved and the limited judicial review it afforded. *Todd Shipyards* notes that due process arguments are particularly inappropriate where the parties have contractually agreed to the nature of arbitration and the limited judicial review afforded under it. The district court had referred to the arbitration disclosures in the subject customer agreement between Barnes and the Logans as follows:

> Arbitration is final and binding on the parties. The parties are waiving their right to seek remedies in court, including the right to jury trial . . . The arbitrator's award is not required to include factual findings or legal reasoning and any parties' right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

Petitioner's voluntary agreement to arbitration, and his voluntary acceptance of the limited judicial review following an adverse arbitration award, is reinforced by the employment form to which he refers in his Petition for a Writ of Certiorari (U-4) as well as the Uniform Submission Agreement he submitted to the NASD whereby he agreed to arbitrate the Logans' claim pursuant to the rules of the NASD. This Court held in *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 115 S. Ct. 1212 (1995) that the rules of the NASD authorize arbitrators to award punitive damages.

III. The Lower Courts' Factual Determination that Petitioner Agreed to Arbitration Fully Aware of the Limited Judicial Review Afforded It Is Not Clearly Erroneous

The standard of review for appellate courts reviewing the confirmation or vacation of an arbitration award is like "any other district court decision . . . accepting findings of fact that are not 'clearly erroneous' but deciding questions of law *de novo*." *First Options, Inc. v. Kaplan*, 514 U.S. 938, 947, 115 S. Ct. 1920 (1995) (citation omitted). Here, as noted previously, the district court found as a matter of fact that petitioner entered into the arbitration agreement fully aware of the nature of the proceedings involved and the limited judicial review it afforded. No argument was made in the Ninth Circuit, nor can one be made now, that this determination is clearly erroneous.

IV. The Limited Record of the Underlying Arbitration Proceedings Militates Against Granting Certiorari

As noted, no transcript reflecting any reporting of the underlying arbitral proceedings was presented to the lower courts. None is therefore part of the record before this Court. Petitioner has no factual support for arguing that the award against him was "capriciously imposed."

CONCLUSION

The Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED, March 1998.

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